Some thoughts on the concept of ‘Responsive Law’ as an overarching conceptual framework for the many ‘vectors’ of current innovations within the legal systems of the world

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Introduction

- Many jurisdictions in the world see innovative initiatives, taking place in all areas of law, within various sectors of society, and provided with various names and labels.

- Most of these initiatives are ‘bottom-up’. Front line legal professionals who are striving to make their work more effective and societally valuable.

- These innovative developments have long been the subject of scholarly attention, but a truly overarching scientific discourse, and with it a generally used overarching conceptual framework to describe and interpret these developments, seems to be lacking so far.
Introduction

• Important schools of thought are for instance Therapeutic Jurisprudence and Restorative Justice

• Attempts at an overarching approach are Non-Adversarial Justice and Comprehensive Law

• In this presentation, we will use examples from Dutch practice to illustrate how the schools of thought from which innovative developments are approached and described interweave with each other

• And we will discuss the potential of Nonet and Selznick’s concept of ‘Responsive Law’ as an overarching conceptual framework.
Innovative developments

- Lydia Dalhuizen: Victim-offender contact

- Cindy Seinen & Esther van Voorst: ‘Societally Effective Judging’

- Cindy: Insolvency court (chronic debt), family court (complex conflicts between parents)

- Esther: Community Justice Center

- Arnt Mein: responsive government lawyer, responsive state under the rule of law
INNOVATIE BINNEN DE RECHTSPRAAK

Overal in het land bedenken rechters en andere professionals manieren om hun werk beter te laten aansluiten bij de behoeften van de samenleving. De Rechtspraak experimenteert met deze ideeën in de vorm van innovatieve pilots. Daarbij staat altijd de rechtzoekende centraal. In deze flyer presenteren wij een overzicht van de lopende pilots. We onderscheiden vier stromingen:

- **EENVOUDIGE CIVIELE PROCEDURE**, waarbij de focus ligt op snelle, toegankelijke en betaalbare rechtspraak voor civiele geschillen,

- **MULTIPROBLEMATIEK/WIJKRECHTSPRAAK**, een stroming die tot doel heeft om effectief bij te dragen aan het oplossen van uiteenlopende, meervoudige problemen van mensen in de wijk,

- **SCHULDENAANPAK**, een aanpak om schuldenproblematiek terug te dringen, en

- **COMPLEXE ECHTSCHEIDINGEN**, gericht op het verminderen van conflicten als mensen uit elkaar gaan.

In deze flyer worden de vier stromingen toegelicht en bijbehorende pilots uitgelicht.
Overige pilots binnen de rechtspraak

Centrale Raad van Beroep
Gerechtshof Amsterdam
Gerechtshof Arnhem-Leeuwarden
Gerechtshof Den Haag
Gerechtshof ’s-Hertogenbosch
Rechtbank Amsterdam
Rechtbank Den Haag
Rechtbank Gelderland
Rechtbank Limburg
Rechtbank Midden-Nederland
Rechtbank Noord-Holland
Rechtbank Noord-Nederland
Rechtbank Oost-Brabant
Rechtbank Overijssel
Rechtbank Rotterdam
Rechtbank Zeeland-West-Brabant
Gradual changes in main stream civil court procedure

- From an almost entirely written procedure to a prominent role for oral hearings
- Prioritizing consensual contributions to conflict resolution over non-consensual ones
- Not only Court Annexed Mediation and training of judges in referral to CAM
- But also active distinguishing between issues on which the parties can reach agreement themselves and issues – aided by their counsels, mediators or comments of judge – and issues for which they need an opinion of the judge
- The ‘facilitating judge’
Facilitating Court
Gradual changes in main stream criminal court procedure

- Growing number and emphasis on victim rights

- Victim-offender mediation as an option offered in the prosecution phase (partly a form of ‘diversion’)

- Victim-offender mediation as a service as a service offered independently of legal procedures such as prosecution and trial
Gradual changes in mainstream administrative court procedure

- rethinking the role of the administrative courts

- less from the point of view of the criteria of the system (e.g. ‘lawfulness’)

- more from the point of view of a useful and fair solution for the citizen (‘justice’)

- Generally used conceptualization: ‘responsive law’ (the responsive lawyer, the responsive state, the responsive court, responsive judging, et.)
<table>
<thead>
<tr>
<th>From traditional</th>
<th>To innovation</th>
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<tbody>
<tr>
<td>1. Juridification</td>
<td>Dejuridification</td>
</tr>
<tr>
<td>2. Procedure oriented</td>
<td>Solution oriented</td>
</tr>
<tr>
<td>3. Adversarial procedures (parties do battle in a legal arena)</td>
<td>Consensual procedures (parties contribute to the solution)</td>
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<td>4. Legal decision making (cutting legal knots, addressing the legal dimension)</td>
<td>More comprehensive ‘problem solving’ (addressing underlying interests, problems and causes)</td>
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<td>5. Limited perception of needs and interests of parties (mainly: pecuniary needs and interests)</td>
<td>Broad perception of needs and interests of parties (including emotions, non-pecuniary needs and interests)</td>
</tr>
<tr>
<td>6. Decision taken by third party</td>
<td>Solution (partly) reached by parties themselves</td>
</tr>
<tr>
<td>7. Decision taker is procedurally passive</td>
<td>Decision taker is procedurally active</td>
</tr>
<tr>
<td>8. System perspective dominant</td>
<td>User perspective is prioritised</td>
</tr>
<tr>
<td>9. Several formally different procedures, with different access points and ‘counters’</td>
<td>Centralised access point, ‘one counter’, triage</td>
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Prefer to watch a short video to know more about Therapeutic Jurisprudence?
The many different labels for legal innovation

Therapeutic Jurisprudence

- Interdisciplinary study of *the law*, that includes the notion that it can have an enormous impact on people
- Borrows from psychology, psychiatry and criminology
- The law can have a healing effect; focus on wellbeing
• David Wexler & Bruce Winick

‘Mental health law would better serve society if major efforts were undertaken to study, and improve, the role of the law as a therapeutic agent’ (Wexler, 1990)

• Broadening of perspective to include change in practice

‘The essential task of therapeutic jurisprudence is to sensitise judges to the fact that they are therapeutic agents in the way they play their judicial roles’ (Wexler, 2003)
The many different labels for legal innovation
The many different labels for legal innovation

<table>
<thead>
<tr>
<th>Criminal Justice</th>
<th>Restorative Justice</th>
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<tbody>
<tr>
<td>Crime and wrongdoing is committed against the state and is a violation of the law</td>
<td>Crime and wrongdoing causes harm to individuals and communities</td>
</tr>
<tr>
<td>Seeks to determine guilt and impose punishment</td>
<td>Concerned with repairing the harm caused by crime and wrongdoing</td>
</tr>
<tr>
<td>Excludes the people impacted form the justice outcome</td>
<td>The people most affected by crime or wrongdoing should be key to the resolution of the harm caused</td>
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</tbody>
</table>
The many different labels for legal innovation

- Focus on restoring and recovering: relational, emotional and moral level
- Victim-offender mediation, circles and conferencing
- ‘Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future’ (Marshall, 1998)
RJ and TJ: overlap?

- In practice and academia, RJ and TJ do not seem to mix
- RJ and TJ have in common a recognition of the importance of factors such as trust, procedural fairness, emotional intelligence and relational interactions
The many different labels for legal innovation

RJ and TJ: overlap?

Therapeutic Jurisprudence and Restorative Justice emerged as a result of the endemic failures of the criminal justice systems in responding to:

- drug and alcohol related crime
- mentally disordered and intellectually disabled offenders
- high rates of Indigenous over-representation in the courts and prisons
- repeat family violence offenders
- Etc.
Comprehensive Law

(Susan Daicoff, 2011)
This “comprehensive law” movement explicitly seeks to resolve legal matters in ways that are optimal for the individuals and entities involved in the matter, in terms of personal functioning, interpersonal relationships, wellbeing, and morale. To do so, it values concerns beyond simply the legal rights and obligations of the parties. This is a “rights plus” approach.
Nine converging ‘vectors’:

<table>
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<tr>
<th>Collaborative law</th>
<th>Procedural justice</th>
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<td>Creative problem solving</td>
<td>Transformative mediation</td>
</tr>
<tr>
<td>Holistic justice</td>
<td>Restorative justice</td>
</tr>
<tr>
<td>Preventive law</td>
<td>Therapeutic jurisprudence</td>
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<td>Problem solving courts</td>
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The many different labels for legal innovation

Non-Adversarial Justice

(King, Freiberg, Hyams & Batagol, 2nd ed 2014)
Responsive Law

(Nonet & Selznick, 2017)

Social sciences reflection on the position of law in society

Historical development:

• Repressive law
• Autonomous law
• Responsive law
Repressive law

Law is used as a tool by the political elite. The law is subordinate to the political system and is used mainly for maintaining order. The law is a means to enforce obedience and to confirm the authority of those in power.
Autonomous law

The law can also function as a full-fledged counterpart to politics, whereby countering the abuse of power and oppression by the political elite is an important function of the law. Laws, rules and procedures occupy a central position in this legal framework and the principle of ‘the rule of law’ applies.

However, as (administrative) organisations become more and more institutionalised and the complexity of regulation increases, the more the interpretation of the law becomes a matter for experts.
Responsive law

This is the last stage of evolution and implies that not procedures but principles take precedence. The law and legal institutions meet social needs, and solutions are sought that can be characterised as just from a social perspective.

Experienced justice is thus a more important criterion than the precise observance of legal rules. Those rules are means to an end. The end is justice, both material and experienced.
Historical development of the relationship between law and society according to Nonet and Selznick